No. 85-993

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PAULA A. HOBBIE, *Appellant*,
v.
UNEMPLOYMENT APPEALS COMMISSION AND
LAWTON AND COMPANY, *Appellees*.

On Appeal From The District Court Of Appeals Of The State Of Florida Fifth District

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

This Reply Brief will direct itself to the extraordinary position taken by the Solicitor General in its *Amicus Curiae* Brief. That position proposes a major departure from this Court's free exercise doctrine precedents and would institute a new test for deciding the constitutionality of governmentally imposed restrictions on religious practices.

A THE SOLICITOR GENERAL ASKS THE COURT TO MAKE A MAJOR DEPARTURE FROM ITS FREE EXERCISE PRECEDENTS. THE TEST PROPOSED IS ITSELF DOCTRINALLY INCONSISTENT; NOT JUSTIFIED BY ANY PROGRAMMATIC INTEREST OF THE UNITED STATES; AND IS LEGALLY FLAWED.

1. The New Test Proposed By The Government Is Internally Inconsistent And Only Partially Responsive To Present Doctrine.

Under present free exercise doctrine, a law which places a substantial burden on a sincerely-held religious belief must pass two hurdles if it is to be applied to the religious claimant: (1) there must be a compelling state interest justifying application of the law in the particular context; and (2) that application must be the least restrictive means (least restrictive of the claimant's religious liberty) of accomplishing the state's compelling purpose.

The Solicitor General Brief attacks this doctrine in two important ways: (1) it offers a change in the level of burden on religious liberty that triggers the two-part test; and (2) it says absolutely nothing about the "compelling state interest/least restrictive means" test. The proposed test allows that neutrally framed, designed and applied government programs do not ordinarily present Free Exercise Clause problems. The point is unexceptionable, since the *Sherbert-Yoder-Thomas*[1] line of

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[1] *Sherbert* v. *Verner*, 374 U.S. 398 (1963), *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), and *Thomas* v. *Review Board*, 450 U.S. 707 (1981).

cases has always concerned the question of exceptions to otherwise valid, *prima facie* "neutral" state laws.

The entire question is whether *prima facie* neutrality is *sufficient* to deny a free exercise claim. Apparently, the Solicitor General concedes the possibility that indirect and unintentional burdening of religion may also be constitutionally prohibited. The undue attention to facial neutrality, however, begs the question of whether a state policy is truly "neutral" in terms of the liberties protected by the Free Exercise Clause when it ignores religious differences that suggest exceptions to the standard rules of treatment. If "neutrality" means that "likes should be treated alike," it also means that unalikes should be treated *unalike*. True neutrality, as the Solicitor General would seem to agree, sometimes means that religion *must* be treated differently. The truly important part of its Brief, then, is that which seeks to change the circumstances in which "indirect" burdening of religion will be recognized notwithstanding the *facial* neutrality of a law.

The proposed test changes the threshold level of religious burden needed to trigger the two-part test. The current standard holds a cognizable burden on religious liberty to exist when the effect of some governmental policy is to put "substantial pressure" on an adherent to modify his behavior and thereby violate his religious beliefs. *Thomas* v. *Review Board*, 450 U.S. 707, 718 (1981). The Solicitor General would impose a much higher initial threshold: Only laws that actually "prohibit" religious exercise "rather direct[ly]" (Br. at 10) or "bear so heavily on an individual's choice as to have virtually the preclusive effect of a direct prohibition" (Br. at 5) even pose Free Exercise Clause difficulty. This change is justified by either the language of the First Amendment or the intentions of the Framers. (The lack of support for this argument is treated at length below).

Once a law is shown to have such a "prohibitory" effect, it is not clear whether the Solicitor General intends that the "compelling interest/least restrictive means" test *then* comes into

play, or whether the violation of the Free Exercise Clause is established. Failure to address this question is one of the major analytic flaws of the proposed test. From the tone of the Brief, it is perhaps fair to presume that the *prima facie* neutrality discussion is designed to *replace* "compelling interest/least restrictive means," but this is nowhere made clear, and is logically inconsistent with the Solicitor General's concession that some "neutral" laws will still violate individual's free exercise rights.

Finally, the test concedes that even where a policy is neutrally formulated and applied, a free exercise claim may be made out if "the state's action is not neutral between religious practices, or between religious and other analogous personal choices." This hedge is similarly incoherent. If a law is facially neutral, what does it mean for it *not* to be neutral between religious practices? If it means that the government policy has a disproportionate impact on one particular belief or group of beliefs *because of their unique religious situation* and not because of the government policy *per se*, the Solicitor General's discussion of *facial* neutrality is *entirely* irrelevant. Yet, if that is not what the exception means, it means nothing at all. Adding further confusion is the idea of neutrality between religious practices "and other personal choices." An additional question arises as to whether the Solicitor General really means to suggest that the First Amendment provides no greater protection for religious choices than for nonreligious personal choices, and that religious and nonreligious choices must always be treated as "likes."

2. The Proposed Test Is Not Justified By Any Significant Interest Of The United States.

While the Solictor General might be thought to have a continuing interest in the proper interpretation of all provisions in the Constitution, its *programmatic* interest is in the protection of federal programs from constitutional challenges. These challenges come in the form of Free Exercise Clause claims for exemption from or modification of governmental regulations *in*

a particular case (as, for example, were at issue last term in *Bowen* v. *Roy*, 54 U.S.L.W. 4603 (1986)) and *Goldman* v. *Weinberger*, 106 S.Ct. 1310 (1986) and, more frequently, Establishment Clause challenges to entire government programs or federal statutes (*See, e.g., Aguilar* v. *Felton*, 105 S.Ct. 3232 (1986); *Bender* v. *Williamsport*, 106 S.Ct. 1326 (1986); *Corporation of the Presiding Bishop of the Church of Latter-Day Saints* v. *Amos*, 594 F. Supp. 791 (D. Utah 1986), *review granted* 55 U.S.L.W. 3307 (U.S. Nov. 3, 1986) (Nos. 86-179, and 86-401). For obvious reasons, the latter is the greater interest: free exercise challenges ask for narrow, if irritating, exceptions to the rules, while establishment challenges seek to wipe out the rules and programs themselves.

The Solicitor General's Brief seems to appeal to the latter interest on the theory that narrowing the Free Exercise Clause will permit more government programs to survive Establishment Clause challenges. (Br. 19-25) If this is the primary interest of the United States, its Brief ill-serves that purpose for two reasons.

First, it is illogical to conclude that a narrowing of the Free Exercise Clause will achieve a broader scope for permissible state accommodations of religion free from Establishment Clause challenge. The Brief correctly assumes that there is a middle ground "between" the prohibitions of the two clauses. But even on this theory, any broadening of the middle ground of permissible accommodation comes only at the expense of what otherwise would have been thought to be constitutionally *required* accommodation. There is no sound reason to believe that expanding the "breathing space" in one direction will serve to expand it in the other direction as well. Such a result is *entirely* dependent on the Court's willingness to adjust its Establishment Clause analysis *as well as* its free exercise analysis. It cannot be argued in support of the position taken in the Brief that it serves to lessen the circumstances in which government programs are thought to run afoul of the Establishment Clause.

Second, the Solicitor General's Brief may, ironically, work in opposition to such a purpose. In several cases in which government policies have been upheld against Establishment Clause challenge, it has been important to the Court's decision that the government policy at issue was, if not actually compelled by the Free Exercise Clause, strongly counselled by free exercise principles. It is interesting that the only majority opinion cited by the Solicitor General in support of the proposition that a conflict exists between the Free Exercise and Establishment Clauses is *Walz* v. *Tax Commission*, 397 U.S. 664 (1970).[2] In *Walz*, it was important if not crucial to the Supreme Court's upholding the constitutionality of church property tax exemptions that the denial of such exemptions would create serious free exercise and entanglement problems. 397 U.S. at 674. *See also Katcoff* v. *Marsh*, 755 F.2d 223, 224, 237 (2d Cir. 1985) (military chaplaincy does not violate Establishment Clause because it is a permissible means of reaching what may be a constitutionally *required* end). Indeed, it is a powerful response to the "strict separation" argument that such a position would require separation even at the expense of disparate

[2] The other authorities include Justice Rehnquist's dissent in *Thomas* v. *Review Board*, 450 U.S. 707, 726, and Justice Stewart's dissent in *Sherbert* v. *Verner*, 374 U.S. 398, 414. Both of these dissents attack the Court's free exercise holdings because they conflicted with the Court's Establishment Clause analysis. But both opinions also vigorously maintained that the Establishment Clause analysis was wrong. To the extent that both of these dissents were prompted by the anomly of such a "conflict" (the point for which they are cited here), it is important to note that the conflict could have been resolved by a less "wooden" or "sterile" interpretation of the Establishment Clause. *See, Thomas*, 450 U.S. at 727 and *Sherbert* 374 U.S. at 414. This would also resolve the conflict on grounds satisfactory to the majority of the commentators cited in footnotes 9 and 10 of the Solicitor General's Brief.

The citation to Justice White's dissent in *Widmar* v. *Vincent*, 454 U.S. 263 (1981) is truly astonishing. Not only was White the sole dissenter in that case, but the government has quite properly urged the application of *Widmar* in other contexts. See Brief for the United States as *Amicus Curiae* in *Bender* v. *Williamsport Area School District*, 106 S.Ct. 1326 (1986). Justice White himself is now apparently willing to follow *Widmar* in analogous circumstances, in accordance with the Solicitor General's argument in *Bender*. 106 S.Ct. 1326 at pages 1336-1338. (Burger, C.J., dissenting).

and discriminatory treatment of religious individuals. This is essentially an argument that takes advantage of the supposed "conflict" between the two clauses as a way of defending a governmental program's validity. Positions akin to this were urged by the government in *Witters* v. *Washington Commission for the Blind*, 106 S.Ct. 748 (1986) and *Aguilar* v. *Felton*, *supra*. It took *precisely* such a position in its *amicus curiae* brief in *Thornton* v. *Caldor, Inc.*, 105 S.Ct. 2914 at ____, ("The Establishment Clause cannot be taken to prohibit Connecticut from extending to the private workplace the requirement of making the very sort of accommodation to Sabbath observances that the Free Exercise Clause was found to require of South Carolina in *Sherbert*") and would do well to take such an approach in the upcoming *Amos*, *supra*, cases. In sum, a broad free exercise right serves as a powerful buttress to the constitutionality of a wide array of government programs against Establishment Clause challenge.[3]

It is therefore perplexing that the Solicitor General advances an argument that runs precisely counter to this reasoning. At page 13 of the Brief, an argument is made to support the proposition that "there is a clear difference between interfering with a person's ability to follow his religious beliefs and not providing him with funds to make such activity more comfortable or rewarding." Regardless of one's position on various Administration programs, such an argument undermines the very rationale for several Administration programs, such as the education "voucher" plans. The premise underlying such plans is that the denial of some form of "subsidization" burdens

[3] In a rather perverse reversal of field, the Solicitor General's Brief employs language taken *in haec verba* from its *Caldor* Brief to make the exact reverse of the point made in *Caldor*. *Compare The Solicitor General's Caldor* brief at 15, n.19 with its Brief here at 25, n.12. Whereas in *Caldor*, the possibility of a conflict between two Religion Clauses was used in support of the argument that Connecticut's law did not violate the Establishment Clause, in the Solicitor General's Brief the argument is impressed into the service of a claim that the Free Exercise Clause should be narrowed in order to avert any conflict.

choice, and that when the burdened choice is one of private relgious education as opposed to state-run education, an important interest in religious liberty is compromised. Voucher supporters often argue that equivalent subsidization of alternatives to state-run schools is constitutionally *required*.

The form and, equally importantly, the tone of the argument made in the Solicitor General's Brief (Br. 13), belittling the nature of the religious liberty interests involved, could have the effect not of broadening the *tertium quid* but only of shifting it: fewer free exercise claims would be recognized, accommodations would be thought permissible where they previously had been thought required, and a greater number of government programs might even be thought unconstitutional on Establishment Clause grounds, where they previously had been regarded as permissible accommodations.

3. The Position Advanced By The Solicitor General Threatens To Undermine Religious Liberty.

Concern with the Solicitor General's position is not limited to undermining the defensibility of government programs that promote religious liberty, but also involves the narrowing of circumstances in which individuals seek exemption on religious grounds from otherwise valid statutes. The Solicitor General's Brief fails to acknowledge the extent to which its proposed free exercise test would require overruling the Court's most significant free exercise precedents and completely discard settled doctrine. Of greatest concern, however, is that this "interest" of the United States seems not to have been weighed against the countervailing interest of the United States (and this Administration, in particular) in a continued commitment to the principle of religious liberty. Such a weighing would counsel against the position urged in the Solicitor General's Brief.

1. The whole premise of the new test proposed by the Solicitor General is that religious freedom is less impaired when it is impaired inadvertently or indirectly. From the perspective of the religious adherent (the perspective con-

templated by the Bill of Rights), this clearly makes no sense. The point that the Brief seems to be making is that religious freedom is *less likely in fact* to have been violated in those circumstances when the government statute is both neutrally *framed* (a term which encompasses both neutral wording and neutral intent) and even-handedly applied. This, however, is not a doctrinal point but a factual question: has the government policy indeed placed "substantial pressure on an adherent to modify his behavior and violate his [religious] beliefs . . ."? *Thomas*, 450 U.S. at 717-718. One could argue that *Thomas* and *Sherbert* should not be read so broadly a to say that such "substantial pressure" will *always* be present in these types of cases or that there is a *conclusive* presumption of unconstitutional effect. One could further argue that, as a *factual* matter, no such pressure has been shown to exist in this case, and that a remand is necessary to develop the record which might support or negate such a conclusion.[4] But the Court in *Thomas* was surely correct in noting that whether such compulsion exists has nothing to do with whether it occurs as the result of direct or indirect governmental actions. While it may well be the case that a statute which literally singles out religion for adverse disparate treatment is more likely to violate the Free Exercise Clause rights of individuals, it is still the case that government may infringe the free exercise of religion by acts of omission as well as acts of commission.

A closely related shortcoming of the Solicitor General's Brief is its willingness to pretend that denial of a benefit to which others similarly situated are entitled does not impose a burden

[4] It would seem that the Solicitor General's real interest in these cases is in not having the government's facially neutral policy *presumed* to violate an individual's free exercise rights. The question is whether Hobbie, Sherbert or Thomas could *prove* that the government policy of not recognizing any "personal" reasons as adequate grounds for quitting *of its own force* put substantial pressure on them to modify their behavior and violate their religious beliefs. Intuitively, such proof is unlikely; the real "pressure" came from the actions of the employer. Yet, in both *Sherbert* and *Thomas*, the claimant would rather quit than violate the tenet.

on the individual denied the benefits. This is thought to create problems only of equality, and not of freedom. (Br. at 14) But such a facile distinction cannot be made; the Free Exercise Clause must be construed *at minimum* to encompass a right to equal civil rights for religious persons. *See, e.g., McDaniel* v. *Paty*, 435 U.S. 618 (1978).

The key questions are: (1) whether facially "neutral" laws necessarily result in equal treatment for religious persons, given the sometimes conflicting requirements of their religion; and (2) whether access to general public benefits is a civil entitlement.

The first question is far more "nuanced" (*compare* Br. at 3) than the Brief recognizes. The word "neutral," standing by itself, is vacuous. What is it with respect to which government is supposed to be neutral? Without addressing this question, "neutral" becomes merely a conclusory label. *Sherbert* emphasized the requirement of neutrality "in the face of religious differences." 374 U.S. at 409. This seems correct. In Free Exercise Clause cases the thing with respect to which government must be "neutral" is *freedom of religious exercise*.

The second question—whether access to general benefits is an "entitlement"—is troubling for one reason only: It seems to imply an endorsement of the legitimacy of the Welfare State. Of course, this is not actually the case. All that is required is recognition that, for better or worse, in the age of the modern Welfare State, many governmental benefits are quasi-entitlements, the deprivation of which on account of religious *belief or exercise* is the functional equivalent of imposing that burden directly.[5]

To summarize: Other than as an empirical proposition, whether a government policy results in a burden on religious

[5] The Solicitor General's heavy reliance on *Johnson* v. *Robison*, 415 U.S. 361 (1974), (Br. at 14-15) is misplaced for the obvious reason that the claimant therein was not similarly situated to others claiming veterans benefits—in that he had not participated in military service.

liberty has very little to do with whether the policy produces that result directly or indirectly, intentionally or unintentionally. Whether the government policy is in fact "neutral" depends far less on the way it is written than on whether it produces disparate effects on the freedom of religious exercise. The Free Exercise Clause requires "neutrality in the face of religious differences." The Brief's halting departure from this principle is cause for concern.

2. Where a religious claimant can establish by proof that a government policy really has put substantial pressure on him to modify his behavior and thereby violate his sincerely-held religious beliefs, one may legitimately ask why the government *ought not* to be required to show a "compelling" reason for continuing to apply such substantial pressure on the religious adherent. The relatively few and idiosyncratic claims presented do not threaten to destroy entire government programs and, where they would so threaten, the government arguably has a compelling interest sufficient to overcome the Free Exercise claim, so long as its program is well-designed. In short, present Free Exercise doctrine scarcely places unreasonable demands on government; where religious claims *would* impose unreasonable demands, *that* is the government's defense. Broad protection of religious exercise imposes minimal costs on government, and produces enormous benefits to the liberties of religious persons and groups. Given the Administration's commitment to religious liberty, any weighing of the various interests at stake counsels against so radical a constriction of free exercise rights as is proposed in the Solicitor General's Brief.

If no Free Exercise Clause violation exists unless, as urged by the Solicitor General, the effect of the government action is virtually to *shut down* a religious belief, religious practice, or religious community, the protections of that Clause are quite narrow indeed. Highly intrusive governmental regulations could be imposed on religious institutions without regard to their impact on the autonomy of those institutions, so long as their religious practices were not out-and-out prohibited, or

very nearly so. The identity of such institutions could be threatened, or at the very least, subject to the "optional accommodation" of government, varying with the degree of sensitivity to religious concerns shown by varying administrations of federal, state and local governments. The Solicitor General appears not to have considered the full implications of the position proposed.

3. It is of no small concern that the Solicitor General has understated the degree to which this new theory would require overruling the Court's major Free Exercise Clause precedents. It argues that the new test "harmonizes the general course of the Court's free exercise clause decisions" (Br. 5), but downplays the fact that the proposed position would require (1) *abandoning* completely the Court's well-settled doctrine in this area, and (2) *overruling* the Court's most significant free exercise decisions. The Brief refers to Appellant's Brief as representing the "extreme theory" neglecting to note that this is by and large the theory advanced in *Sherbert* and *Thomas*, and in *Wisconsin* v. *Yoder* as well.[6] While indeed the Court might have decided *Sherbert* on narrower grounds than it in fact did, certainly it is of some consequence that the limiting rationale was in no way suggested by the Court's opinion. Moreover, the Solicitor General's brief at the same point, tacitly suggests that those same factual features applied in *Thomas* v. *Review Board* as well. Indeed, of course, they did

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[6] The Solicitor General offers only the most cursory attention to *Yoder*, (Br. at 11, n.7), stating simply that whether a neutrally-written "prohibitory" law could ever violate the Free Exercise Clause is not presented by the *Hobbie* case. This is, of course true, but it is not urging a focused position concerning the application of the Court's precedents to a particular situation. It is proposing that Free Exercise Clause claims be subjected to a new test. It would seem incumbent to address the ramifications of that new test for one of the Court's most important Free Exercise Clause precedents. The statute at issue in *Yoder* was not clearly "prohibitory" under the terms of the proposed test; the Amish could continue to exercise their religious belief for a cost of only $5 a piece. *See* 406 U.S. at 208. It is perhaps revealing that the new test is as opaque as not to be capable of a clear application in one of the Court's landmark free exercise cases.

not; the very existence of this factual difference between *Sherbert* and *Thomas* was what permitted Justice Rehnquist to dissent even on the assumption that *Sherbert* was correctly decided. To state the matter forthrightly: to adopt the position proposed would necessarily mean overruling *Thomas* v. *Review Board* (decided just five years ago by a vote of 8-1), disapproving the rationale in *Sherbert* in favor of a fact-bound basis for that holding, and placing the continued validity of *Wisconsin* v. *Yoder* in a state of considerable uncertainty.

4. The Solicitor General Has Departed From The Jurisprudential Hallmarks Of This Administration: Judicial Restraint And A Commitment To The Careful Examination Of The Constitutional Text.

It is too late in the day to read the Free Exercise Clause as permitting laws which substantially impair religious exercise, so long as they do not prohibit it. Only if the historical argument is clear and convincing that the Framers intended such an extreme position would the Solicitor General be justified in proposing such a radical reconstitution of present case law. The historical argument does not begin to approach such a level. Instead, the Brief (7-8) advances a rather curious textual argument. It attaches significance to the differences between the modifying words preceding each of the First Amendment's prohibitions. The conclusion is then offered, without supporting historical analysis, that this linguistic difference reflects a considered judgment by the Amendment's adopters to accord a different, lesser degree of constitutional protection to religious exercise than freedom of speech or the press. Such an approach does not do justice to any consistent "originalist" jurisprudence.

The central inquiry in constitutional interpretation is the meaning of the text. Under a jurisprudence of original intent, the meaning of the words used is best determined by looking to the meaning that was accorded those words by the persons who wrote and adopted the provision in question. That is, the meaning of the language is informed by the historically demonstrable intentions of the Framers. The approach of the Solicitor General is precisely backwards: an examination of the dictionary definition of the words (from a 1979 dictionary)[7] produces a view that is then read back into history *as if* it reflected the intentions of the Framers.

In the first place, this argument reaches the truly extraordinary conclusion that the Founding Fathers actually intended to give the free exercise of religion less protection from government interference than freedom of speech and of press. This defies common sense, as well as much of what we know about the high esteem in which the Framers held freedom of religion. Secondly, the legislative history cited by the Brief does not

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[7] Even if one could accept the somewhat strained hypothesis that the Framers chose the different words "abridging" and "prohibiting" to express different levels of intended constitutional protection, one would want to consider whether the words chosen by the Framers at the time had the degree of distinction in meaning that they have today or were taken as being more closely synonymous. A study of the meaning of these words recorded in Noah Webster's original 1828 dictionary reveals that the Solicitor General has engaged in seemingly anachronistic lexicography.

"Abridge" had, as one of its meanings, a sense much closer to "prohibit" than it does today. Webster offered four definitions: "1. To make shorter; . . . to contract by using fewer words, yet retaining the sense in substance. . . ; 2. To lessen; to diminish. . . ; 3. *To deprive; to cut off from;* . . . 4. *In Algebra, to reduce a compound quantity.* . . ." (emphasis added).

"Prohibit" had, as one of its primary meanings, a sense much closer to "abridge" than the more absolute meaning it has acquired today. Webster offered two basic definitions: "1. To forbid; to interdict by authority. . . ; 2. *To hinder; to debar; to prevent; to preclude.* . . ." (emphasis added).

Interestingly, in the principle form, the words in 1828 were very nearly synonymous, in some respects. "Abridging" was defined as "shortening; lessening; depriving; debarring"; "prohibiting" was defined as "forbidding; interdicting; debarring." ("Debarring" was defined as "preventing from approach, entrance, or enjoyment.")

This is not to argue that the two words had identical meanings for the Framers as they drafted what became the First Amendment. It is merely to point out that one may conclude a great many things from studying the dictionary definitions of words. One thing that cannot fairly be concluded is that the Framers necessarily intended, by using the word "prohibiting" at one point and "abridging" a little on, to have chosen language with the more distinct and different meanings those words were to acquire by 1979.

bear out this conclusion, and is not supported by the authorities on which the Solicitor General relies. The Brief (9-10) makes the observation that the Framers were motivated by concerns of religious persecution and intolerance. This is certainly a correct statement, but it says nothing about the scope of the constitutional provision adopted to address this problem. The only actual "legislative history" cited is Madison's statement. The only other historical source offered is Jefferson's Bill for Religious Liberty. Neither source supports the point. Madison's statement is treated as if it referred half to the Establishment Clause and half to the Free Exercise Clause. It is not at all clear that Madison's reported remarks were not solely in response to his colleague's inquiry as to the meaning of the Establishment Clause alone. (At least this is how this history has been treated in earlier submissions by the Solicitor General, see Brief *Amicus Curiae* in *Bender* v. *Williamsport*, 106 S.Ct. 1326 at 15.)

The reference to the Court's reliance on Jefferson's Bill is even more problematic. In the first place, the Court's reliance on various state approaches to religious liberty as explicating the meaning of the federal Bill of Rights is suspect. At the very least, a state's view is not determinative of the meaning of the federal constitutional provision. (Interestingly, Virginia's proposal for a federal constitutional amendment concerning religious liberty differed both from its state constitutional provision and from the Bill for Religious Liberty.) Second, the use to which the Solicitor General's Brief puts the Court's treatment of Jefferson's Bill is highly selective. The Court has also cited the portion of Jefferson's Bill which declared that "'it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.'" *Reynolds* v. *United States*, 98 U.S. 145, 163 (1878).

It is precisely the lack of clarity in the historical record that preludes a cut-and-dried argument from original intent, as even the most solidly orginalist writers concede. *Thomas* v.

Review Board, 450 U.S. at 721-722 (Rhenquist, J., dissenting) ("Because those who drafted and adopted the First Amendment could not have foreseen either the growth of social welfare legislation or the incorporation of the First Amendment into the Fourteenth Amendment, we simply do not know how they would view the scope of the two clauses.") M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* at 19 (1978). The argument in the Solicitor General's Brief in this case is simply unsupported by the historical evidence.

This does not mean that the Brief's textual argument is unsupportable. The question then becomes whether the language of the Free Exercise Clause should be read as limited only to prohibitory government acts, absent historical warrants for such a reading. Such view would, of course, be unprecedented. More to the point, such a view proposes a major contraction in the protection presently afforded religious liberty, as discussed above. Accordingly, such a position should not lightly be proposed, even were its historical defensibility better established.

5. The Religion Clauses Need Not Work At Cross-Purposes With One Another.

Though the exact scope to be given each clause may not be precisely illuminated by the original intentions of the Framers, the one inference that is most clear from the history is that the Framers had no intention of writing a constitutional provision that was self-contradictory, in theory or in application. If any revision of the Court's doctrine is to be proposed, in order to bring it more in line with the original intent of the Framers, it should be along these lines: The Solicitor General should consider attacking the problem of the supposed "tension" or "conflict" between the two clauses. As noted above, free exercise principles buttress the constitutionality of government accommodations of religion against establishment challenges. Conversely, the more selective the governmental accommodation, and the less it seems dictated by considerations of protecting the *constitutional* right to the free exercise of religion, the

closer it comes to posing genuine Establishment Clause problems. The two clauses seem to work together more often than they pull in opposite directions.

This would have been the better approach for the Solicitor General to take, and one that need not cut back on the principle of religious liberty: Where the government policy is *prima facie* neutral, the burden lies with the religious claimant to demonstrate, not simply assert, that the ~~policy nonetheless~~ puts "substantial pressure" on him to violate his religion.

It is therefore disappointing to see the Solicitor General cite the Court's *Engle* v. *Vitale*, 370 U.S. 421 (1962) dictum approvingly (Br. at 11): "'[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of *direct governmental compulsion* and is violated by the enactment of laws which establish an official religion whether those laws operate *directly to coerce* non-observing individuals or not.'" The better argument to make is that this dictum (and it is only that) misses the mark, and that the following principle should be followed: where the government policy is *prima facie* neutral, the burden lies with the person challenging the statute, on *either* free exercise or establishment grounds to demonstrate (not simply assert) that the policy *nonetheless puts "substantial pressure" on him to alter his behavior*, and thereby violate his religious beliefs (free exercise), or adopt religious practices he otherwise would not have adopted, but for the governmental pressure (establishment).

II. CONCLUSION

The new free exercise test proposed by the Solicitor General in hostile hands could be transformed into selective accommodation with only majority religious practices accorded the protection of the Free Exercise Clause. It would seriously contract the existing safeguards and denigrate those liberties safeguarded by the First Amendment. As a consequence, the test proposed by the Solicitor General should be rejected and, as requested, the matter on appeal be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Reply Brief has been furnished by U.S. Mail to Joseph W. Carvin, Esquire, Alley and Alley, Chartered, Post Office Box 1427, Tampa, Florida 33601, counsel for Lawton and Company, and Richrd S. Cortez, Esquire, Ashley Building, Suite 221, 1321 Executive Center Drive East, Tallahassee, Florida, counsel for Unemployment Appeals Commission. Additionally, copies of the Reply have also been furnished to each *Amicus Curiae* named in this case.

Walter E. Carson, Esq.